91-599

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DONALD CALLIHAN, dba S.H.E. VIDEO,
TRM CORPORATION, dba NETWORK VIDEO,
and
RANDY SCHILOT,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, FAIRFIELD COUNTY, OHIO

PETITION FOR WRIT IN A CRIMINAL CASE

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QUESTIONS PRESENTED

I. WHETHER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION MANDATE A PRIOR JUDICIAL DETERMINATION OF PROBABLE CAUSE TO BELIEVE THAT EXPRESSIVE MATERIALS ARE OBSCENE BEFORE THESE MATERIALS MAY BE SUBMITTED TO A GRAND JURY BY A PROSECUTOR TO OBTAIN AN INDICTMENT AND BEGIN A CRIMINAL PROSECUTION.

STATEMENT OF CORPORATE AFFILIATION

Petitioner TRM Corporation has no subsidiaries, and there is no corporation which is the parent of Petitioner TRM Corporation.

PARTIES INVOLVED

In addition to the parties named in the caption of this case (Donald Callihan, dba S.H.E. Video, TRM Corporation, dba Network Video, and Randy Schilot), William McCutcheon, II, was a Defendant-Appellee in the court of appeals. McCutcheon, however, was not a party before the Ohio Supreme Court or in the trial of this matter in the Lancaster Municipal Court. McCutcheon is not a Petitioner herein.

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OPINIONS BELOW

The decision of the Lancaster Municipal Court dismissing the charges brought against Petitioners was entered on January 30, 1990 (copy attached; appendix p. 1a). The decision of the Court of Appeals of Ohio, Fifth Appellate District, Fairfield County, reversing the dismissal of the charges against Petitioner was entered on January 22, 1991. The decision was not reported and a copy of the unpublished opinion is at-

tached. *State* v. *Callihan*, Slip Op. No. 5-CA-90 Fairfield Ct. App. Jan. 22, 1991) (copy attached; appendix p. 5a). A Notice of Appeal and a Memorandum in Support of Jurisdiction was filed with the Ohio Supreme Court. The Ohio Supreme Court, in a four to three decision, declined to accept this case for review. *State* v. *Callihan*, 61 Ohio St.3d 1409, 574 N.E.2d 1073 (1991) (copy attached; appendix p. 10a).

JURISDICTIONAL STATEMENT

The decision of the Ohio Supreme Court declining to accept jurisdiction of this case was entered on July 3, 1991. No rehearing was requested. This writ of certiorari is requested pursuant to 28 U.S.C. § 1259.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First Amendment, United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Fourteenth Amendment, United States Constitution, Section One, which provides that:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 2907.32, Ohio Revised Code, which provides that:

> (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
>
> (1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;
>
> (2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;
>
> (3) Create, direct or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;
>
> (4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;
>
> (5) Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section.
>
> (B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

4. Section 2907.323, Ohio Revised Code, which provides that:

(A) No person shall do any of the following:

(1) Photograph any minor who is not the person's child or ward in a state of nudity, or create, direct, produce, or transfer any material or performance that shows the minor in a state of nudity, unless both of the following apply:

(a) The material or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance;

(b) The minor's parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used.

(2) Consent to the photographing of his minor child or ward, or photograph his minor child or ward, in a state of nudity or consent to the use of his minor child or ward in a state of nudity in any material or

performance, or use or transfer such material or performance, unless the material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance;

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

(B) Whoever violates this section is guilty of illegal use of a minor in a nudity-oriented material or performance. Whoever violates division (A)(1) or (2) of this section is guilty of a felony of the second degree. Whoever violates division (A)(3) of this section is guilty of a misdemeanor of the first degree. If the offender

previously has been convicted of or pleaded guilty to a violation of division (A)(3) of this section, illegal use of a minor in a nudity-oriented material or performance is a felony of the fourth degree.

5. Rule 6 of the Ohio Rules of Criminal Procedure, which provides that:

(A) Summoning grand juries. The judge of the court of common pleas for each county, or the administrative judge of the general division in a multi-judge court of common pleas or a judge designated by him, shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of nine members, including the foreman, plus not more than five alternates.

(B) Objections to grand jury and to grand jurors.

(1) Challenges. The prosecuting attorney, or the attorney for a defendant who has been held to answer in the court of common pleas, may challenge the array of jurors or an individual juror on the ground that the grand jury or individual juror was not selected, drawn, or summoned in accordance with the statutes of this state. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified, if it appears from the record kept pursuant to subdivision (C) that seven or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(C) Foreman and deputy foreman. The court may appoint any qualified elector or one of the jurors to be foreman and one of the jurors to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall upon the return of the indictment file the record with the clerk of court, but the record shall not be made public except on order of the court. During the absence or disqualification of the foreman, the deputy foreman shall act as foreman.

(D) Who may be present. The prosecuting attorney, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(E) Secrecy of proceedings and disclosure. Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No grand juror, officer of the court, or other person shall disclose that an indictment has been

found against a person before such indictment is filed and the case docketed. The court may direct that an indictment shall be kept secret until the defendant is in custody or has been released pursuant to Rule 46. In that event the clerk shall seal the indictment, the indictment shall not be docketed by name until after the apprehension of the accused, and no person shall disclose the finding of the indictment except when necessary for the issuance of a warrant or summons. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

(F) Finding and return of indictment. An indictment may be found only upon the concurrence of seven or more jurors. When so found the foreman or deputy foreman shall sign the indictment as foreman or deputy foreman. The indictment shall be returned by the foreman or deputy foreman to a judge of the court of common pleas and filed with the clerk who shall endorse thereon the date of filing and enter each case upon the appearance and trial dockets. If the defendant is in custody or has been released pursuant to Rule 46 and seven jurors do not concur in finding an indictment, the foreman shall so report to the court forthwith.

(G) Discharge and excuse. A grand jury shall serve until discharged by the court. A grand jury may serve for four months, but the court upon a showing of good cause by the prosecuting attorney may order a grand jury to serve more than four months but not more than nine months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another eligible person in place of the juror excused.

(H) Alternate grand jurors. The court may order that not more than five grand jurors, in addition to the regular grand jury, be called, impanelled and sit as alternate grand jurors. Alternate grand jurors, in the order in which they are called, shall replace grand jurors who, prior to the time the grand jury votes on an indictment, are found to be unable or disqualified to perform their duties. Alternate grand jurors shall be drawn in the same manner, shall have the same qualifications, shall be subjected to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular grand jurors. Alternate grand jurors may sit with the regular grand jury, but shall not be present when the grand jury deliberates and votes.

6. Rule 21 of the Ohio Rules of Criminal Procedure, which provides that:

(A) When Permitted. Where an indictment or information charging only misdemeanors is filed in the court of common pleas, such court may retain the case for trial or the administrative judge may, within fourteen days after the indictment or information is filed with the clerk of the court of common pleas, transfer it to the court from which the bindover to the grand jury was made or to the court of record of the jurisdiction in which venue appears.

(B) Proceedings on transfer. When a transfer is ordered, the clerk of the court of common pleas shall transmit to the clerk of the court to which the case is transferred, the indictment, information, and all other papers in the case, or copies thereof, and any bail taken, and the prosecution shall continue in that jurisdiction.

STATEMENT OF THE CASE

On August 21, 1989, the Fairfield County Grand Jury returned an indictment against Petitioner Donald L. Callihan, dba S.H.E. Video (hereinafter "Petitioner"). The indictment charged this Petitioner with six (6) misdemeanor counts of pandering obscenity in violation of Ohio Revised Code § 2907.32. On that same date, the grand jury returned an indictment against Petitioner TRM Corporation, dba Network Video. The indictment charged this Petitioner with twelve (12) misdemeanor counts of pandering obscenity in violation of Ohio Revised Code § 2907.32. Finally, and again on the same date, an indictment was returned charging Petitioner Randy Schilot with twelve (12) misdemeanor counts of pandering obscenity in violation of Ohio Revised Code § 2907.32.

Because the charges returned in these indictments constituted only misdemeanors, the Court of Common Pleas of Fairfield County transferred all of these cases to the Lancaster Municipal Court pursuant to Rule 21 of the Ohio Rules of Criminal Procedure by separate orders dated August 25, 1989. Two of the cases were assigned to Judge Joseph R. Ralston (89-CRB-973 and 89-CRB-961). The third case (89-CRB-972) was assigned to Judge James W. Luse; however, on November 7, 1989, a motion to transfer was filed in that case, and all these cases were assigned to Judge Ralston.

In addition to other pretrial motions, the same motion to dismiss the indictment was filed in each case on October 30, 1989. One of the issues raised in each motion was that there had been no judicial determination of probable cause to believe that the materials, which were the basis for the indictments, were obscene or unprotected by the First Amendment prior to the materials being shown to the grand jury and an indictment returned. A joint hearing was held on January 22, 1990, on, *inter alia*, the motion to dismiss the indictments. In a decision dated January 30, 1990, Judge Joseph Ralston found that, *inter alia*, the motion to dismiss the indictment was well-

taken. (Copy attached.) Judgment entries dismissing the indictments were filed February 7, 1990, and timely notices of appeal were filed on February 15, 1990, to the Court of Appeals for the Fifth Appellate District, Fairfield County, Ohio, by the State of Ohio.

On January 22, 1991, the Court of Appeals, in an opinion by Judge Norman Pulman, reversed the decision of the trial court and remanded the case for further proceedings. *State* v. *Callihan*, Slip Op. No. 5-CA-90 (Fairfield Ct. App. Jan. 22, 1991), unreported (copy attached). From that decision a notice of appeal and a memorandum in support of claimed jurisdiction was filed seeking review by the Ohio Supreme Court. On July 3, 1991, in a split decision, the Ohio Supreme Court declined to accept jurisdiction of this case. Chief Justice Thomas J. Moyer, together with Justices Andrew Douglas and Herbert R. Brown, dissented from the decision to deny review of this case.

The following facts are uncontroverted and are from the agreed statement of facts filed with the court of appeals in this case pursuant to Rule 9(D) of the Ohio Rules of Appellate Procedure. On August 21, 1989, the Fairfield County Grand Jury returned indictments charging Petitioners with various violations of Ohio Revised Code § 2907.32(A)(2) and Ohio Revised Code § 2907.32(A)(5). Pursuant to Rule 21 of the Ohio Rules of Criminal Procedure, the Fairfield County Common Pleas Court transferred the cases to the Lancaster Municipal Court on August 25, 1989. Petitioners Callihan, Schilot and TRM each filed motions to dismiss on December 19, 1989, and each motion raised seven identical issues. On December 19, 1989, the state filed a memorandum contra to the motions to dismiss. On January 22, 1990, a hearing and oral argument was held before the Honorable Joseph R. Ralston. At that hearing, the following stipulations of fact, among others, were entered on the record:

(a) On the particular days in question, as stated in the indictment, video-cassette tapes were rented from Petitioners by deputy sheriffs who were working in an undercover capacity.

(b) During the rental period, the deputy sheriffs made duplicate copies of the video-cassette tapes without a search warrant or other judicial order. Following their duplication, the original tapes were returned to Petitioners within the rental period.

(c) The parties consolidated the cases of TRM, Callihan, and Schilot for the sole purpose of the motion to dismiss.

(d) The grand jury returned indictments against Petitioners after veiwing the duplicates of the video-cassette tapes and prior to any determination of probable cause by a judicial officer.

On January 30, 1990, the municipal court rendered a written decision that overruled branches one, two, five and six of Petitioners' motion to dismiss. The municipal court sustained Petitioners' motion as to branch three, which alleged that there had been no prior judicial determination before the materials were shown to the grand jury, and the municipal court did not rule on branch four or seven of the motion in view of its ruling on branch three. The State of Ohio timely filed a notice of appeal to the Court of Appeals for the Fifth Appellate District, Fairfield County, Ohio.

The Court of Appeals based its decision on the Ohio Rules of Criminal Procedure which do not provide for a probable cause determination by a judge prior to the institution of criminal obscenity charges. *Callihan*, Slip Op. at 4; appendix p. 8a. Because "[a]ppeals courts [sic] do not promulgate criminal procedure rules in Ohio," the court of appeals held that it could require a judicial officer to review allegedly obscene material prior to the materials presentation to the grand jury. *Id.* The Court stated that its "holding [was] simply procedural." *Id.* The Court of Appeals held that the Ohio Rules of Criminal Procedure permitted misdemeanor cases to be prosecuted by indictment but did not directly address the constitutionality of that process in light of the First Amendment.

STAGE OF THE PROCEEDINGS WHERE THE FEDERAL QUESTIONS WERE FIRST RAISED

In the Lancaster Municipal Court, the federal question raised, by way of motion to dismiss, was whether without a prior judicial determination of probable cause to believe that certain presumptively protected materials were obscene, a grand jury provides sufficient protections to those presumptively protected expressive materials under the First and Fourteenth Amendments to the United States Constitution. The municipal court agreed with Petitioners that no prior judicial determination of obscenity had occurred and that the grand jury alone provided insufficient protection. The municipal court, therefore, dismissed the charges against Petitioners. *See* Decision of the Lancaster Municipal Court, appendix p. 1a.

This same issue was presented to the court of appeals by the State of Ohio as appellant. The court of appeals reversed the decision of the municipal court without addressing the precise issue raised and making what it determined to be a merely procedural ruling. The court of appeals, nevertheless, implicitly held that the Ohio grand jury system was constitutionally sufficient. *See State* v. *Callihan*, Slip Op. at 4; appendix p. 8a. This was the sole issue sought to be raised by Petitioners in the Ohio Supreme Court, which denied review.

REASONS FOR GRANTING THE WRIT

THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION MANDATE A PRIOR JUDICIAL DETERMINATION OF PROBABLE CAUSE BEFORE MATERIAL THAT IS PRESUMPTIVELY PROTECTED BY THE FIRST AMENDMENT MAY BE PRESENTED TO A GRAND JURY BY A COUNTY PROSECUTOR AS BEING CRIMINALLY OBSCENE.

The singular issue presented by this case involves the degree of and need for judicial oversight in making a probable cause determination that expressive materials, presumptively protected by the First and Fourteenth Amendments of the United States Constitution, are obscene when the government seeks to charge an individual with the crime of possessing or distributing "obscenity." The unique and special place that freedom of speech was given by the framers of the United States Constitution requires close judicial scrutiny when expressive materials are involved in crimial proceedings, in order to prevent protected speech from being constrained by the attempt to punish speech that is not protected by the First Amendment. When an indictment involving expressive materials is returned by a grand jury in Ohio without a prior judicial determination that there is probable cause to believe those materials to be obscene, there is no constitutionally sufficient supervision by the judiciary. The court of appeals, therefore, misunderstood and mischaracterized the import of the trial court's ruling by holding that its reversal was based on simply procedural grounds.

The "right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets [the United States of America] apart from totalitarian regimes." *Terminiello* v. *Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 895 (1949). "[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police*

Dept. of City of Chicago v. *Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290 (1972) (citations omitted).

Expressive materials which are obscene are not protected by the First Amendment and can be regulated only if they meet the tripartite definition of "obscene" fashioned by this Court. *See Roth* v. *United States*, 354 U.S. 476, 77 S.Ct. 1304 (1957), *overruled in part, Miller* v. *California*, 413 U.S. 15, 93 S.Ct. 2607 (1973) (hereinafter "*Miller-Roth* definition"). A particular expressive work is obscene, and therefore unprotected by the First Amendment to the United States Constitution, if and only if, "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest. . . [and] the work depicts or describes sexual conduct, in a patently offensive way . . . [and] the work, taken as a whole, lacks serious literary, artistic or political value." *Miller*, 413 U.S. at 24, 93 S.Ct. at 2615 (citations omitted).

The United States Supreme Court cases are replete with examples of the tension between the freedoms guaranteed to protected speech, and the permissible reach of state statutes and state procedures designed to regulate unprotected speech. Any "regulation by the States [must] conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated [from obscenity] only by a dim and uncertain line." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 637 (1963). This Court has, therefore, consistently required that all "regulations of obscenity *scrupulously embody the most rigorous procedural safeguards* . . . [because] the freedom of expression must be ringed with adequate bulwarks." *Id.* (citations omitted; emphasis added). Because the *Miller-Roth* test is a legal test, it follows that the necessary procedural safeguards must involve the judiciary, as it is only the judiciary that can be expected to provide the proper legal guidance. This means, therefore, that the judiciary must be available and vigilant to ensure that the protections of the First Amendment are not eroded by either state statutes or state procedures.

The line between state regulation seeking to punish past offenses involving presumptively protected speech and the danger that the same regulation will act as a future restraint on other protected speech cannot be drawn with clarity. By providing criminal sanctions for expressive materials, a state will undoubtedly create some tendency for "self-censorship" by its citizens. The Supreme Court recognized "many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503, 72 S.Ct. 777, 781 (1952) (citations omitted). Because of the devastating potential that prior restraints possess, "*[a]ny* prior restraint on expression comes to [the Supreme] Court with a 'heavy presumption' against its constitutional validity." *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1578 (1971) (emphasis added; citations omitted). When law enforcement officials deal with material that they believe to be obscene, considerations come into play that fundamentally differ from the considerations when other kinds of evidence or contraband are at issue. In this regard, the Supreme Court has recognized that "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting *or with respect to another kind of material.*" *Roaden* v. *Kentucky*, 413 U.S. 496, 501, 93 S.Ct. 2796, 2800 (1973) (emphasis added; citations omitted). The importance of expressive material in our society requires special treatment whenever it is the subject of an investigation by a law enforcement agency. It is well established that all expressive material entering the marketplace is presumptively protected by the First Amendment. *Id.* at 504, 93 S.Ct. at 7801.

The First Amendment, for example, requires different treatment of expressive materials in that they may not be seized 'incident to a lawful arrest' as can other items. *Id.* at 505, 93 S.Ct. 2802. In another context, the Supreme Court has repeatedly held that a "pretrial seizures of expressive materials could only be undertaken pursuant to a 'procedure designed to focus searchingly on the question of obscenity' " by a

magistrate. *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 63, 109 S.Ct. 916, 927 (1989) (citations omitted). Additionally, "until there [is] a *judicial determination* of the obscenity issue in an adversary proceeding . . ." expressive materials "may not be taken out of circulation completely. . . ." *Id.* at 63, 109 S.Ct. at 927 (emphasis added). It is the "risk of prior restraint, which is the basis for the special Fourth Amendment protections accorded searches for and seizures of First Amendment materials. . . ." *Maryland* v. *Macon*, 472 U.S. 463, 470, 105 S.Ct. 2778, 2782 (1985).

The fact that expressive materials must be given special treatment was made absolutely clear in the famous quote from *A Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205, 84 S.Ct. 1723 (1964). There, this Court stated that:

> It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband. We rejected that proposition in *Marcus* [v. *Search Warrant*, 367 U.S. 717, 81 S.Ct. 1708 (1961)]. *Id.* at 211-12, 84 S.Ct. at 1726.

Nor is the importance that the First Amendment places on judicial supervision limited to cases involving searches and seizures of expressive materials under the Fourth Amendment. In another context, the Supreme Court addressed an alleged prior restraint by a "morality" commission created by the Rhode Island legislature in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 83 S.Ct. 631 (1963). In that case, the commission sent notices to distributors of various publications listing those publications that were "objectionable" in the opinion of the commission. *Id.* at 62-63, 83 S.Ct. at 635.

This Court held that the actions of the commission constituted a prior restraint, and it specifically held that such a system can only be constitutional "where it operate[s] under

judicial superintendence and assure[s] an almost immediate *judicial determination* of the validity of the restraint." *Id.* at 70, 83 S.Ct. at 639 (citations ommitted; emphasis added). The lack of judicial supervision, therefore, was a vital element in the Court's decision that the commission's regulation of expressive materials created a prior restraint and violated the guarantees of the First Amendment. The functioning of the commission in *Bantam Books* is very comparable to the functioning of the Ohio grand jury system and, as will be discussed, suffers from many of the same infirmities.

The Supreme Court has also found the lack of judicial supervision a factor in holding a city's system requiring permits for public demonstrations unconstitutional. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 89 S.Ct. 935 (1969). In *Shuttlesworth*, a commission which had the authority to issue or refuse to issue "parade permits" was held to constitute a prior restraint that abridged the public's right to assemble peaceably and voice political protest. *Id.* at 150-51, 89 S.Ct. at 938. One of the deficiencies of the parade permit system was that lack of a procedure whereby "*the judiciary [could] determine* whether the parade proposal is consistent with the important interests respecting the use of the streets which local authority may legitimately protect." *Id.* at 164, 89 S.Ct. at 945 (Harlan, J., concurring) (emphasis added).

This need for judicial supervision has also been recognized in a case where a religious group brought suit to enjoin the enforcement of a city ordinance regulating the distribution of literature and solicitation of funds in an airport. *Fernandes* v. *Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed* 458 U.S. 1124, 103 S.Ct. 5 (1982). The ordinance in that case was challenged as "unconstitutional because it lacks procedural safeguards. . . ." *Id.* at 628. The Court of Appeals held that the "ordinance's lack of procedural safeguards *assuring prompt judicial review* presents a prior restraint problem." *Id.* (emphasis added). The "lack of these safeguards. . ." required the Court of Appeals to hold that the ordinance violated the constitution. *Id.* This close judicial scrutiny, therefore, is not

merely an offshoot of obscenity cases, but is mandated in all cases where a prior restraint might possibly exist and presumptively protected materials might be negatively impacted.

The special danger of a prior restraint on expression is that presumptively protected speech will be suppressed, either directly or by inducing an excessive caution in the speaker. *Pittsburgh Press Co.* v. *Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 390, 93 S.Ct. 2553, 2561 (1973). In other words, the danger inherent when expressive materials, presumptively protected by the First Amendment, are attacked as being unprotected and subjected to criminal penalties is that the mere attempt to prevent the unlawful acts will also prevent the lawful exercise of free speech. *See American Civil Liberties Union* v. *Board of Education*, 55 Cal.2d 167, 10 Cal.Rptr. 647, 359 P.2d 45 (1961), cert. denied, 368 U.S. 819, 82 S.Ct. 34 (1961).

The Supreme Court has succinctly explained the rationale behind the presumption against the lawfulness of prior restraints:

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340; "[f]or standards of permissible statutory vagueness are strict in the area of free expression * * * Because the First Amendment freedoms need breathing space to survive. . . . When one must guess what conduct or utterance . . . [is impermissible], one necessarily will "steer far wider of the unlawful zone * * *." *Speiser* v. *Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342. *For "[t]he threat of sanctions may deter * * * almost as potently as the actual application of sanctions."* (Citations omitted.) *The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded by sensitive tools. . . . Keyishian* v. *Board of Regents*, 385 U.S. 589, 603-604, 87 S.Ct. 675, 684 (1967) (emphasis added; citations in original).

It is this *in terrorem* effect of the attempt to criminalize unprotected speech on protected speech that requires "sensitive tools" by the government when it enacts legislation that purports to place criminal sanctions on presumptively protected speech and special treatment when law enforement moves to prosecute individuals under such legislation. Indeed, the guarantees embodied in the First Amendment have been held to require special treatment and "sensitive tools" even in civil suits between individual citizens even when the government is not involved.

For example, the "actual malice" standard that public officials must meet in order to recover damages for a defamatory falsehood relating to their official conduct is necessary to prevent "self-censorship" on the part of critics of the government. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279, 84 S.Ct. 710, 725 (1964). If critics would be forced to prove the truth of their factual assertions they would be deterred from voicing that criticism, even if they believe the facts to be true, because of the doubt of whether it could be proved or because of fear of the expense of having to prove it in a court of law. *Id.* Indictments have this same "chilling effect" on protected speech and the same constitutional concerns are involved when an indictment is returned that touches upon expressive materials.

In this case, the grand jury returned misdemeanor indictments against Petitioners. No judicial scrutiny of the process of the expressive materials was involved. While the grand jury may be a *de jure* arm of the judiciary, it is well recognized as a *de facto* arm of the prosecutor. This procedure provides no sensitivity to the danger of prior restraint on purely lawful speech. By bringing an indictment, the state can place enormous pressure on an individual to submit to the government's censorship and, at the same time, place others in such fear of public embarassment and humiliation, that they will perform the exact form of self-censorship that the First Amendment, and the courts, have labored to prevent. This is in addition to the time and expense involved in defending the charges, which are not inconsequential.

An example of the deficiencies of this system, and especially the lack of early supervision by the judiciary, can be seen by the recent prosecution of the Robert Mapplethorpe photographs exhibited in Cincinnati, Ohio. *See e.g. Cincinnati* v. *Contemporary Arts Center*, 57 Ohio Misc.2d 9, 566 N.E.2d 207 (Hamilton Mun. Ct. 1990). The same issue presented in this case was raised in *Contemporary Arts Center*: whether there is a need for an independent judicial determination of probable cause to believe that the presumptively protected material at issue is unprotected by the First Amendment prior to the submission of the material to the grand jury. *See id.* at 11, 566 N.E.2d at 211. In that case, as here, the court misunderstood the nature of the issue and held that under the Ohio Rules of Criminal Procedure "there is no provision to dismiss a criminal case founded on the lack of probable cause." *Id.* at 12, 566 N.E.2d at 211; *see also Callihan*, Slip Op. at 4; appendix p. 7a.

These procedural rulings demonstrate a misconception by these courts as to their proper role in protecting our freedoms. When a constitutional provision conflicts with a state law or a state rule of procedure, the constitutional provision must prevail, and, moreover, it is well-established that the First Amendment applies to the states. *See Times Film Corp.* v. *Chicago*, 365 U.S. 43, 81 S.Ct. 391 (1961). The *Contemporary Arts Center* (hereinafter "*CAC*") case, and its attendant publicity, graphically demonstrates how an indictment of expressive materials necessarily creates a prior restraint or other presumptively protected material because once one indictment has been returned other individuals will be afraid to express themselves and run the risk of criminal charges.

The charges in *CAC* were violations of Ohio Revised Code § 2907.323(A) and § 2907.32(A)(2). *CAC* at 11-12, 566 N.E.2d at 211. Each of these charges was a misdemeanor. *See* Ohio Revised Code § 2907.32(C) and § 2907.323(B). It has been reported in the press that the defense of these charges cost the Contemporary Arts Center three hundred fifty thousand dollars ($350,000.00). *See* Columbus Dispatch, Nov. 12,

1990. Few individuals could pay, or would run the risk of having to pay, such legal fees necessary to defend *misdemeanor* charges and, in effect, be required to prove that their expressive materials are indeed fully protected by the First Amendment. The same kind of self-censorship that so concerned this Court in *New York Times Co.* v. *Sullivan* is, therefore, implicated when the grand jury returns an indictment that relates to any presumptively protected materials and no judicial determination has been made that there was probable cause to believe the materials to be obscene.

Indeed, the mere return of the indictment by a grand jury was recognized as a means of creating a prior restraint by those on both sides of the Mapplethorpe controversy, *See* Cincinnati Enquirer, Oct. 6, 1990; Philadelphia Inquirer, Oct. 7, 1990; New York Times, Oct. 7, 1990. The Philadelphia Inquirer reported in its story that: "In Cincinnati, the vice squad has been asked to review arts offerings in advance of the public." The Cincinnati Enquirer reported that one individual stated: "That is the secret of clean Cincinnati . . . you make it so onerous[,] you make the threat of prosecution so great, that [controversial] exhibits won't come here." *Id.*

In this case, a grand jury returned misdemeanor indictments against Petitioners. There is no dispute that no judicial officer ever viewed the material or even reviewed a description of the material in this case to determine whether there was probable cause to believe the material was not protected by the First Amendment. Government officials thus remain free to bring criminal charges against expressive materials which they personally find inappropriate and, by use of their discretion in dismissing charges, cast themselves in the role of a self-appointed community censor. By agreeing to dismiss the charges if the particular work is withdrawn, the work is censored and no judicial determination of the presumptively protected material is ever made. This is indeed a powerful tool considering the inherent time, expense, embarrassment and humiliation involved in defending such charges. The public is denied access to the material without any deter-

mination that the material is unprotected by the First Amendment.

In Ohio, the "decision to pursue or drop criminal charges is vested in the state." *Brown* v. *Best Products Co.*, 18 Ohio St.2d 32, 33, 479 N.E.2d 852, 855 (1985). An Ohio County prosecutor is granted "[v]ast discretion . . ." in making the decision "to determine what charges shall ultimately be brought to trial" *State* v. *Malone*, 14 Ohio Misc.2d 18, 19, 471 N.E. 2d 892, 894 (Van Wert Mun. Ct. 1984). Furthermore, if such a dismissal (or *nolle prosequi*) is not expressively stated to be "with prejudice", it is not a bar to the reinstitution of the original charge. *See State* v. *Stephens*, 52 Ohio App.2d 361, 370 N.E.2d 759 (Cuyahoga Ct. App. 1977). A county prosecutor in Ohio can, therefore, bring repeatedly dismissed charges against material the prosecutor finds personally objectionable, and thereby repeatedly censor the same expressive materials over and over again without any judicial intervention whatsoever.

The county prosecutor is also immune from suit for all practical purposes. Prosecutors are considered "quasi-judicial" officers entitled to absolute immunity when their activities are "intimately associated with the judicial phase of the criminal process. . . ." *Imbler* v. *Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 994-95 (1976). The Ohio Supreme Court has held that a prosecutor has absolute immunity "in initiating a prosecution. . . ." *Willitzer* v. *McCloud*, 6 Ohio St.3d 447, 449, 453 N.E.2d 693, 695 (1983) (citations omitted). Should the county prosecutor choose to become the censor, there is no practical recourse available to those whose materials are threatened. Even if the defendants are ultimately successful in court, they may be financially ruined by the repeated costs of defending obscenity charges, and the expressive materials are removed from circulation just as surely as if the materials were all seized and destroyed.

The grand jury system has its historical roots in England during the reign of King Henry II. W. LaFave and J. Israel,

Criminal Procedure, 347 (1985). As it functions in society today, the grand jury has become the accusatory arm of the prosecutor. Kravitz, *The Grand Jury; Past - Present - No Future*, 24 Mo.L.Rev. 318, 327 (1959). As Justice Douglas has observed "[i]t is indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive." *United States* v. *Mara*, 410 U.S. 19, 23, 93 S.Ct. 774, 776 (1973) (Douglas, J., dissenting). A majority of the Supreme Court also has recognized that the "grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor. . . ." *United States* v. *Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 773 (1973). Great Britain, the birthplace of the grand jury, virtually abolished it in 1933. *See* Administration of Justice (Misc. Provisions) Oct. 1933, 23, & 24 Geo. 5, c. 36, § 13.

In Ohio, a grand jury consists of nine (9) members. Ohio R. Crim. P. 6(A). An indictment, however, may be returned if only seven (7) grand jurors concur. Ohio R. Crim. P. 6(F). In the obscenity case, nearly one-fourth of the grand jurors could be convinced that the expressive work does not appeal to the prurient interest of an average member of the community, or that the material has serious literary, artistic, political or scientific value, but an indictment would issue nonetheless. When it is understood that grand juries almost always follow the recommendation of the prosecutor, the ease with which a local county prosecuting attorney can "set up shop" as the local censor of expressive materials is apparent.

Several empirical studies have concluded that grand jurors rarely deviate from the prosecutor's recommendations. *See e.g.* Moley, *The Initiation of Criminal Prosecution by Indictment or Information*, 29 Mich.L.Rev. 403, 415 (1931) (in a survey of three separate states, grand juries followed the prosecutor's recommendation in ninety-five percent (95%) of all cases); Note, Some Aspects of the California Grand Jury System, 8 Stan.L.Rev. 631, 653-54 (1956) (grand jury returned over ninety-four percent (94%) of indictments

sought); Morse, *A Survey Of The Grand Jury System*, 10 Ore.L.Rev. 101, 145 (1933) (grand jury returned over eighty-three percent (83%) of indictments sought). In a survey of Ohio prosecutors, over seventy-five percent (75%) of the respondents indicated that they would strongly advise a grand jury whether to return an indictment or would indicate their opinion as indirectly as possible. Lee, *The Grand Jury In Ohio: An Empirical Study*, 4 U.Dayton L.Rev. 325, 340 (1979).

These statistics do not imply that the county prosecutor in this particular case did anything improper. Petitioners, similarly, make no claim that anything improper occurred in this case. It is because of the possibility of censorship, either by a county prosecutor directly or indirectly by "self-censorship" of individuals fearing the possibility of criminal charges, that close judicial supervision of any such system is constitutionally mandated. Absent such supervision, this system of bringing criminal charges against individuals for possession or distribution of presumptively protected materials is unconstitutional because it fails to protect the important freedoms guaranteed by the First Amendment. The operation and effect of any system by which expressive materials are sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances in which it is applied, and the validity of the system can turn on the safeguards that it affords. *Speiser* v. *Randall*, 357 U.S. 513, 521, 78 S.Ct. 1332, 1339 (1958). Without the prior probable cause determination by a neutral, detached magistrate, the grand jury system provides no judicial supervision and no realistic safeguards.

The Ohio Supreme Court and the other courts of Ohio have also recognized the realities of the grand jury process. "The grand jury in its inquest of crimes and offenses, and in its finding and presentation of indictments to the Court of Common Pleas, *does not exercise a judicial function.*" *State, ex rel. Doerfler*, v. *Price*, 101 Ohio St. 50, 120 N.E. 173 (1920), paragraph one of the syllabus (emphasis added); *see*

also Wickline v. *Alvis*, 103 Ohio App. 1, 144 N.E.2d 207 (Franklin Ct. App. 1957). More important is that "the court of common pleas does not involve itself in the decision making of the grand jury. . . ." *State, ex. rel. Shoop*, v. *Mitrovich*, 4 Ohio St.3d 220, 221, 488 N.E.2d 579, 580 (1983). Assuming that the prosecutor fully explains the intricacies of First Amendment law to the grand jury, lay grand jurors have neither the training to understand the full implication of returning an indictment that involves expressive materials nor can they constitutionally be permitted to perform the traditional duties of the judiciary, in this case determining whether there is probable cause to believe that certain expressive materials are "obscene."

In reality, there is no valid distinction between the "morality" commission that the Supreme Court held to lack sufficient constitution safeguards in *Bantam Books* and the grand jury system used in this case. Neither operates under close judicial superintendence nor does either system provide for "an almost immediate judicial determination. . . ." *See Bantam Books*, 372 U.S. at 70, 83 S.Ct. at 639.

The municipal court properly held that, in order to guarantee the freedoms contained in the First Amendment, there must be some form of prior judicial review of the presumptively protected materials sought to be the basis for the criminal charge brought. A grand jury comprised of lay people led by a prosecutor cannot be entrusted to protect the freedoms guaranteed by the First Amendment and cannot be expected to fully comprehend the "intractable obscenity problem" contained in the *Miller-Roth* three-pronged definition of obscene material. *See Miller*, 413 U.S. at 16, 93 S.Ct. at 2610. It cannot be seriously disputed that each of *Miller-Roth* prongs "involve[] legal and definitional problems of major importance. . . ." F. Schauer, The Law of Obscenity p. 69 (Bureau of National Affairs 1976). The definition of obscenity has caused serious problems for the most learned and respected jurists this country has produced. To expect that lay grand jurors will be able to comprehend the nuances of these

complex legal theories truly is to exalt form or substance. When a grand jury is confronted with crimes alleging "obscene" materials, it is, therefore, more subject to control by the prosecutor than when the alleged crimes do not involve First Amendment freedoms. The grand jury is more likely to follow the direction of the prosecutor on whether to indict and, in reality, an indictment will be returned at the whim of the prosecutor.

The prosecutor for a given county in Ohio is an elected official subject to all the political pressures of any elected official. Law enforcement officers "engaged in the often competitive enterprise of ferreting out crime" simply do not have the same perspective as a "neutral and detached magistrate." *Johnson* v. *United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369 (1948). When the political pressures of an elected official are added, it is apparent that "the inherently difficult decision respecting whether particular material is obscene can under no circumstances properly be left to investigating authorities. . . ." *Maryland* v. *Macon*, 472 U.S. 463, 473, 105 S.Ct. 2778, 2784 (1985) (Brennan, J., dissenting) (citations omitted). This issue was not decided in *Macon*. *Id.* at 467, 105 S.Ct. at 2777 ("We do not decide whether a warrant is required to arrest a suspect on obscenity-related charges. . . ."). It would seem patent that a police officer cannot constitutionally arrest a person on a criminal charge involving obscenity on the basis of an affidavit presented to a clerk of courts. Similarly, a prosecutor may not constitutionally present expressive materials to a grand jury and obtain an indictment without any participation by the judiciary. Unless this Court issues a writ in this case, there will be no reason why an Ohio county prosecutor cannot become something completely different and unacceptable under the First Amendment: a local county censor.

CONCLUSION

This case involves a vital question of basic freedom in this county: the freedom of speech. The Ohio grand jury process fails to protect this fundamental guarantee where the indictment is based upon the alleged "obscene" nature of the materials involved. At any time, an Ohio county prosecutor can become a virtual censor of expressive materials without *any* judicial supervision or any determination that the material is, in fact, unprotected by the First Amendment to the United States Constitution.

If permitted to stand, this decision permits, and indeed encourages, Ohio county prosecutors to become county censors. The intervention of the judiciary prior to the presentations of allegedly obscene material to a grand jury is essential. Only by ensuring that a county prosecutor's decision to present presumptively protected material to the grand jury as obscene has a basis in law can the process be controlled. Judges must have the authority to prevent frivolous indictments from being returned, indictments that will result not only in a restraint on the charged material, but also a prior restraint on other presumptively protected material.

Freedom of speech ranks among the most cherished of our liberties. The decision of the court of appeals completely abdicates any judicial role in the bringing of charges against presumptively protected material and thereby severely undermines the essential role of the First Amendment. The judiciary must be vigilant against any possibility of unlawful restraint on presumtively protected speech. This judicial duty cannot be delegated to a commission, a prosecutor or a grand jury. It is the historic function of the courts to act as a restraint on the power of the executive branch of government.

This Court must issue a writ if that function is to be preserved.

Respectively submitted,

SIRKIN, PINALES, MEZIBOV &
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APPENDIX

IN THE LANCASTER MUNICIPAL COURT,
LANCASTER, OHIO

Case Nos. 89-CRB-967
89-CRB-972
89-CRB-973

State of Ohio,

Plaintiff,

v.

Donald Callihan,
Randy Schilot, and
TRM Corporation, dba Network Video,

Defendants.

DECISION
(Filed January 30, 1990)

This matter came on for hearing on the 22nd day of January, 1990, upon the motions to suppress and dismiss filed by the Defendants and upon the Plaintiff's memoranda contra thereto. It was agreed upon by the parties that the above cases be consolidated for purposes of the motion hearings only and they will be tried individually at a later date.

After hearing the testimony and upon reviewing the briefs submitted, the Court acknowledges that this is both a serious and very complex matter and the court commends counsel for both the State and the Defendants for the work they submitted.

The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for *stifling liberty of expression*.

The setting of the bookstore or the commercial theater,

each *presumptively under the protection of the First Amendment*, invokes such Fourth Amendment requirements because we examine what is "unreasonable" in light of the values of freedom of expression.

The foregoing comments were taken from the U.S. Supreme Court case of *Maryland* v. *Macon*, 472 U.S. 463.

It follows that to get beyond the presumptive protection requirements of the First Amendment, there must be a prior judicial determination of probable cause to believe that the videos in question were obscene. This burden is on a judge or magistrate and cannot be delegated to a police officer or another agent of the city, county, state, or grand jury.

The facts stipulated herein indicate that there was no hearing in this matter as required by the First Amendment and the matter was brought directly into the Grand Jury. The Court can find no authority that sustains the proposition that the Grand Jury can execute the judicial functions required in the case at bar. Art. IV of the Ohio Constitution sets out the rule as to judicial power. A copy of Article IV: Judicial, Constitution of the State of Ohio is attached as Exhibit A.

The matter of suppression in regards to the search warrant was withdrawn from the Court's consideration.

The Defendant's motion to dismiss consists of seven branches. After consideration of the stipulations, the briefs, memoranda and the arguments of counsel, the Court finds as follows:

As to Branch 1, regarding the unconsitutionality under the First, Fifth and Fourteenth Amendments to the United States Constitution, motion **OVERRULED**, see *City of Urbana, ex rel., Newlin* v. *Downing*, 43 O.S. 3d. [sic].

As to Branch 2, intrusion of an individual's right to privacy, motion **OVERRULED.** The Court is not persuaded to bootstrap the individual right to privacy over to the Defendants who kept the materials in question for sale to any and all customers.

As to Branch 3, no independent judicial determination of probable cause, motion **SUSTAINED.** Both federal and state cases maintain that works of art, music, literature, movies

and videos are clothed with a presumption of regularity which can only be lifted by the finding of obscenity by an independent, unbiased magistrate at a hearing for this purpose. The briefs contain the cases to this effect including for further reference *The State of Ohio, Appellee,* v. *Loshin, et al., Appellants,* 34 O.A. 3d 62. (Leave to appeal to Supreme Court overruled December 5, 1986 [No. 86-1506].) Reasoning to the contrary would allow the prosecutor and the grand jury to circumvent the U.S. and Ohio Supreme Court rulings.

This is a narrow point, but crucial. There appears to be no precedent to guide us on said point. The Court commends counsel on both sides for their thorough and scholarly briefing in this case.

As to Branch 4, criminal conduct of the Defendants, the Court does not feel it is necessary to rule on this in view of its ruling on Branch 3.

As to Branch 5, violation of the Defendants' rights and privileges as secured by the Fifth and Fourteenth Amendments to the U.S. Constitution, motion **OVERRULED.** The Court does not find that entrapment lies in this matter in the absence of specific court case law.

As to Branch 6, indictment by a Grand Jury whose members were not properly instructed, motion **OVERRULED.** The Court is without evidence to support Defendants' position.

As to Branch 7, the video tapes are protected by the First Amendment of the U.S. Constitution as they are not obscene as a matter of law, the Court feels that it need not rule on this Branch in view of its ruling on Branch 3.

Counsel for the Defendants is hereby directed to file a journal entry in accordance with this decision.

/s JUDGE JOSEPH R. RALSTON

cc: David L. Landefeld, Esq.
County Prosecutor

H. Louis Sirkin, Esq.
Attorney for Defendants

LANCASTER MUNICIPAL COURT,
FAIRFIELD COUNTY, OHIO

Case No. 89-CRB-967

STATE OF OHIO,

Plaintiff,

vs.

DONALD CALLIHAN,
dba. S.H.E. Video,

Defendant.

JOURNAL ENTRY
(Filed February 7, 1990)

This matter having come on for hearing on January 22, 1990, upon defendant's Motion to Dismiss and Motion to Suppress and the Court being fully advised in the premises hereby finds that for the reasons set forth in the Decision filed in this matter on January 30, 1990, the Motion to Dismiss is well taken; and

IT IS THEREFORE ORDERED that the within indictment be and it is hereby dismissed.

/s/ JUDGE JOSEPH R. RALSTON

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COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,
Plaintiff-Appellant,

vs.

DONALD CALLIHAN,
dba S.H.E. VIDEO,
Case No. 5-CA-90

TRM CORPORATION
dba NETWORK VIDEO,
Case No. 6-CA-90

RANDY SCHILOT
Case No. 7-CA-90

and

WILLIAM McCUTCHEON, II,
Case No. 16-CA-90
Defendants-Appellees.

JUDGES: Hon. Norman J. Putman, P.J., Hon. Irene B. Smart, J., Hon. Dean Strausbaugh, J., Tenth Appellate District sitting by assignment.

OPINION

CHARACTER OF PROCEEDING: Criminal Appeal from Municipal Court, Case No. 89-CRB-967

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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PUTMAN, P.J.

These four consolidated appeals are taken by the State of Ohio from a judgment of the Lancaster Municipal Court dismissing indictments against each of the above named appellees for pandering obscenity (R.C. 2907.32(A)).

All cases present a solitary issue. Where the prosecution is commenced by summons and no arrest made and no fourth amendment constitutional search and seizure problem is involved is a grand jury indictment charging violation of R.C. 2907.32(A) subject to dismissal pre-trial for the sole reason that there was no prior or preliminary judicial determination or probable cause hearing before a neutral judicial officer that the material in question was obsene.

The trial court ruled that failure to have the sort of probable cause hearing that attends the issuance of a search warrant is an indispensable condition precedent to the right of a grand jury or the power of a grand jury to indict in obscenity cases.

Separated from considerations of arrest and/or search and seizure, we find no authority for this proposition. Accordingly, we reverse all the judgments and remand each case to the Lancaster Municipal Court for further proceedings according to law.

The appellees in their brief and in oral argument rely upon

the U.S. Supreme Court's case of *Roaden* v. *Kentucky* (1973), 413 U.S. 496, 37 L. Ed. 2d 757, 93 S. Ct. 2796.

We believe that case is inapposite. *Roaden* v. *Kentucky* is a search and seizure case. We have no search and seizure problem here. Moreover, this point of law has been the subject of a published court of appeals opinion by the Court of Appeals for Hamilton County (First District) *State* v. *Loshin* (1986), 34 Ohio App. 3d 62. That case involved devices rather than publications but, in our opinion, there is no practical difference so far as preliminary screening is concerned.

Number two of the syllabus in that case reads:

> 2. A preliminary finding that an item is obscene is necessary before an item can be seized by law enforcement officers. However, when a law enforcement officer buys an allegedly obscene item in the regular course of trade, a preliminary determination that the item is obscene is not required.

Although we are not bound by the judgment of the First Appellate District, we are persuaded that the reasoning is correct as to that paragraph of the syllabus and we elect to follow that paragraph of the syllabus.

There is no provision in the *Ohio Rules of Criminal Procedure* requiring such preliminary screening prior to indictment and it cannot seriously be argued that misdemeanor cases may not be prosecuted by indictment. See Crim. R. 6(F) and Crim. R. 21. The returning of an indictment is not appealable.

All of the important constitutional interests may be protected in this case by the municipal judge determining the First Amendment issues. He may do so and enter an acquittal when the matter is appropriately before him. We repeat no question of unlawful arrest or unlawful search and seizure has been presented here.

Finally, if the pre-indictment judicial screening and probable cause determination is actually mandated by the U.S. Supreme Court decisions the fact remains that it has simply

not been provided for in the Ohio Rules of Criminal Procedure promulgated by the Ohio Supreme Court and adopted by the tolerance of both houses of the legislature pursuant to our Ohio Constitution. See Ohio Const. Art. IV Section 5(B).

Our holding is simply procedural. The pre-indictment screening procedure is not provided for in the Ohio Criminal Rules. Appeals courts do not promulgate criminal procedural rules in Ohio.

If the existence of such a practice is a mandatory condition precedent to the initiation of such charges, then simple logic indicates that Ohio is out of the business of prosecuting obscenity cases until an appropriate rule is either adopted or voluntarily practiced. We decline to make that judgment.

For the foregoing reasons, all four judgments of the Fairfield County Municipal Court are reversed and this cause is remanded to that court for further proceedings according law.

/s/ NORMAN J. PUTMAN
/s/ IRENE BALOGH SMART
/s/ DEAN STRAUSBAUGH
JUDGES

Smart, J. and
Strausbaugh, J. concur.
10th Appellate District
Sitting by Assignment of
the Chief Justice Pursuant
to Article IV Section 5(A)(3).

NJP/1b 1207

IN THE COURT OF APPEALS
FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,
Plaintiff-Appellant,

vs.

DONALD CALLIHAN
dba S.H.E. VIDEO,
Case No. 5-CA-90

TRM CORPORATION
dba NETWORK VIDEO,
Case No. 6-CA-90

RANDY SCHILOT
Case No. 7-CA-90

and

WILLIAM McCUTCHEON, II.
Case No. 16-CA-90
Defendants-Appellees.

For the reasons stated in the Memorandum-Opinion on file, all four judgments of the Lancaster Municipal Court are reversed, and this cause is remanded to that Court for further proceedings according to law.

/s/ NORMAN J. PUTMAN
/s/ IRENE BALOGH SMART
/s/ DEAN STRAUSBAUGH
JUDGES

THE SUPREME COURT OF OHIO

1991 Term
To Wit: July 3 1991
Case No. 91-553

State of Ohio,

Appellee,

v.

Donald Callihan, d/b/a
S.H.E. Video, et al.,

Appellants.

ENTRY
(Filed July 17, 1991)

Upon consideration of the motion for an order directing the Court of Appeals for Fairfield County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Sirkin, Pinales, Mezibov & Schwartz.

(Court of Appeals Nos. 5CA90, 6CA90 and 7CA90)

/s/ THOMAS J. MOYER
Chief Justice

Supreme Court, U.S.
FILED
OCT 30 1991
OFFICE OF THE CLERK

(2)

NO. 91-599

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DONALD CALLIHAN, dba S.H.E. VIDEO
TRM CORPORATION, dba NETWORK VIDEO
and
RANDY SCHILOT,

Petitioners,

vs.

STATE OF OHIO

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, FAIRFIELD COUNTY, OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION MANDATE A PRIOR JUDICIAL DETERMINATION OF PROBABLE CAUSE TO BELIEVE THAT EXPRESSIVE MATERIALS ARE OBSCENE BEFORE THESE MATERIALS MAY BE SUBMITTED TO A GRAND JURY BY A PROSECUTOR TO OBTAIN AN INDICTMENT AND BEGIN A CRIMINAL PROSECUTION.

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NO. 91-599

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DONALD CALLIHAN, dba S.H.E. VIDEO
TRM CORPORATION, dba NETWORK VIDEO
and
RANDY SCHILOT,

Petitioners,

vs.

STATE OF OHIO

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, FAIRFIELD COUNTY, OHIO

PETITION FOR WRIT IN A CRIMINAL CASE

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the items presented by petitioners, respondent cites the following relevant constitutional provisions, statutes, and regulations:

1. The Fourth Amendment, United States Constitution which provides:

AMENDMENT IV

The right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched,and the persons or things to be seized.

2. Section 2939.08, Ohio Revised Code which provides that:

Section 2939.08 Duty of grand jury.

After the charge of the court of common pleas, the grand jury shall retire with the officer appointed to attend it, and proceed to inquire of and present all offenses committed within the county.

3. Rule 7 of the Ohio Rules of Criminal Procedure which provides that:

(A) Use of indictment or information. A felony which may be punished by death or life imprisonment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against him and of his right to indictment, he may waive that right in writing and in open court.

Where an indictment is waived the offense may be prosecuted by information, unless an indictment is filed within fourteen days after the date of waiver. If an information or indictment is not filed within fourteen days after the date of waiver, the defendant shall be discharged and

the complaint dismissed. This subdivision shall not prevent subsequent prosecution by information or indictment for the same offense.

A misdemeanor may be prosecuted by indictment or information in the court of common pleas, or by complaint in courts inferior to the court of common pleas. An information may be filed without leave of court.

(B) Nature and contents. The indictment or the information shall be signed by the prosecuting attorney or signed in his name by an assistant prosecuting attorney, and shall contain a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the applicable section of the statute as long as the words of that statute charge an offense, or in any words sufficient to give the accused notice of all the elements of the offense with which he is charged. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. Each count of the indictment or information shall state the numerical designation of the statute which the defendant is alleged therein to have violated. Error in the designation or its omission shall not be ground for dismissal of the indictment or information, or for reversal of a conviction, if the error or omission did not mislead the defendant to his prejudice.

(C) Surplusage. The court on motion of the defendant or the prosecuting attorney may strike surplusage from the indictment or information.

(D) Amendment of indictment, information or complaint. The court may at any time before, during, or after a trial amend the indictment, information, complaint or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information or complaint, or to cure a variance between the indictment, information or complaint and the proof, the accused is entitled to a discharge of the jury on his motion, if a jury has been impanelled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this subdivision, jeopardy shall not attach to the offense charged in the amended indictment, information or complaint. No action of the court in refusing a continuance or postponement under this subdivision is reviewable except after motion to grant a new trial therefor is refused by the trial court, and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole

proceedings, the reviewing court finds that a failure of justice resulted.

(E) Bill of particulars. When the defendant makes a written request within twenty-one days after arraignment but not later than seven days before trial, or upon court order, the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charged and of the conduct of defendant alleged to constitute the offense. A bill of particulars may be amended at any time subject to such conditions as justice requires.

STATEMENT OF THE CASE

The statement of the case is adequately set forth in the petition.

SUMMARY OF ARGUMENT

Undercover Fairfield County deputy sheriffs rented videotapes from petitioners, made duplicate copies for evidentiary purposes, and returned the videotapes during the rental period. The videotapes were then shown to the Fairfield County Grand Jury which returned indictments against petitioners for pandering obscenity in violation of Ohio Revised Code Section 2907.32.

Respondent can find no authority for the petitioners' contention that a prior judicial determination of obscenity is required before a grand jury can issue an indictment. The mere rental of videotapes is not an impermissible seizure. Accordingly, the trial court improperly dismissed the indictment in this case as the requested prior judicial intervention is not mandated by statute or criminal rule.

REASONS WHY THE PETITION SHOULD BE DENIED

Ohio grand juries may issue indictments for violations of Ohio Revised Code Section 2907.32 without a prior judicial determination of probable cause. Petitioners have failed to document any statutory or case law to support their claim that first amendment cases must be treated differently.

Ohio Revised Code Section 2939.08 authorizes grand juries to inquire of and present all offenses committed within the county. Ohio Criminal Rule 7 provides that "A misdemeanor may be prosecuted by indictment or information in the court of common pleas." An indictment may be found only upon the concurrence of seven or more jurors. Ohio Criminal Rule 6(F).

The enormous scope of a grand jury's power was discussed by this Court in the case of *United States v. Calandra*, 414 U.S. 338 (1974):

> Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. *Id.*, at 343.

Respondent concurs with the assessment by the Petitioners that the only issue in this case involves the degree of and need for judicial oversight constitutionally

mandated before a prosecution for pandering obscenity can be commenced. However, Petitioners have yet to detail the specific authority behind their position on this issue.

This Court has never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversarial hearing applicable to all cases where allegedly obscene material is seized. *Heller v. New York*, 413 U.S. 483, 488 (1973). The Ohio legislature has not mandated prior judicial scrutiny in obscenity prosecutions in either the Ohio Revised Code or the Criminal Rules. Therefore, there is no reason why the Petitioners should be granted a prior adversarial hearing when this procedure has not been mandated by the Ohio legislature.

The petitioners' argument implies that the mere indictment of an individual for pandering obscenity is an unlawful prior restraint on the freedom of expression. The facts of this case are distinguishable from the cases cited by petitioners.

A seizure is defined as a "meaningful interference with an individual's possessory interests." *Maryland v. Macon*, 472 U.S. 463, 469 (1985) Therefore an undercover officer who rents allegedly obscene videotapes does not violate the Fourth Amendment by accepting an offer to do business that is also freely made to the public. *Id.* By renting the videotapes to the undercover officer, the Petitioners voluntarily transferred any possessory interest during the extent of the rental period in exchange for the rental fee. Thus, when a law enforcement officer acquires an allegedly obscene item during the regular course of trade, no preliminary determination of obscenity is required because the item has not been seized. Under Ohio law, the case can then begin either with the signing of a complaint by the officer or by grand jury indictment. Ohio Criminal Rule 7.

This Court recently discussed the important difference between seizing an item by police officers or purchasing an item in connection with an investigation. The Court held: "We have previously rejected the argument that such purchases trigger constitutional concerns." *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46,62 (1989). In that case, the Court noted that "seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding." *Id.,* at 463 (quoting *Heller v. New York,* 413 U.S. 483, 492 (1973)).

This Court discussed the stricter Fourth Amendment requirements for seizure of allegedly obscene materials in the case of *Roaden v. Kentucky,* 413 U.S. 496 (1973). However, this Court declined to require adversarial proceedings whenever allegedly obscene material is involved. In Headnote 5 this Court stated:

> 5. The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes stricter Fourth Amendment warrant requirements for seizure of allegedly obscene material, because what is "unreasonable" is to be examined in the light of the values of freedom of expression; this does not mean an adversary proceeding is needed before seizure, since a warrant may be issued ex parte.

Petitioners' analysis of the decision rendered by the Court of Appeals in this case is greatly oversimplistic. That court held that absent a search and seizure problem, a grand jury indictment charging a violation of Ohio Revised Code Sec. 2907.32(A) is not subject to dismissal solely because there was no preliminary judicial determination that the material in question was obscene. *State v. Callihan,* Slip Op. No. 5-CA-90 (Fairfield Ct. App. Fifth

District, Jan. 22, 1991) Unreported. On July 3, 1991, the Ohio Supreme Court declined to exercise jurisdiction in that case. *State v. Callihan,* 61 Ohio St.3d 1409 (1991).

The municipal court in granting Petitioners' motion to dismiss claimed reliance on the rationale used in the case of *State v. Loshin,* 34 Ohio App.3d 62 (Hamilton Ct. App. First District 1986). Number two of the syllabus in that case reads:

> 2. A preliminary finding that an item is obscene is necessary before an item can be seized by law enforcement officers. However, when a law enforcement officer buys an allegedly obscene item in the regular course of trade, a preliminary determination that the item is obscene is not required." *Id.* at 62. A motion to certify the record to the Supreme Court of Ohio was overruled on December 5, 1986, in Case No. 86-1506.

Therefore, the *Loshin* case actually supports respondent's action in this case.

In addition to the First and Fifth District Court of Appeals, the Tenth District Court of Appeals of Ohio has upheld prosecution of obscenity cases after indictment without prior judicial scrutiny. In the case of *State v. Wolfe,* 41 Ohio App.3d 119 (Franklin Ct. App. Tenth District 1987), the Court of Appeals reversed a motion to dismiss that had been granted by the trial court after the Franklin County Grand Jury indicted the defendant on two counts of Pandering Obscenity.

In that case, the Tenth District Court of Appeals upheld the State's assignment of error and reversed the decision of the trial court stating that "the trier of facts must decided whether the average person applying contemporary community standards would find that the work taken as a

whole appeals to the prurient interest..." *Id.* at 125. A motion to certify the record to the Supreme Court of Ohio was overruled on January 27, 1988, in Case No. 87-1960.

The petitioners did not cite any case, statute or criminal rule that supports their contention. In Ohio, a Grand Jury is considered to be sophisticated enough to determine death penalty cases, Racketeer Influenced and Corrupt Organization (RICO) cases involving Federal law and complex white collar crime cases. Petitioners' contention that a Grand Jury is unable to decide misdemeanor obscenity cases is simply illogical.

Petitioners also advance the argument that because the Prosecuting Attorney is an elected position, there is a political nature to his job. Therefore, they argue, he is incapable of instructing Grand Jurors on the applicable law in First Amendment cases. It is respectfully submitted that the public pressure concerning a death penalty case or serious felony crime is much more significant than a misdemeanor obscenity case like the one at bar. Further, in Ohio, all Judges are elected and would likewise be subject to the same political pressure.

There is no suggestion in the record that the Grand Jury in this case was improperly instructed. Absent any evidence to the contrary, the trial court and all reviewing courts must conclude that the Grand Jury was properly instructed on the law.

Petitioners have presented several matters that are not germane to this case. The size of attorneys fees in other cases and opinions advanced by newspaper editorialists have no relevance to this case. Perhaps those matters are appropriate in the legislative arena, but not in a criminal prosecution.

There is no requirement under Ohio law that a Judge

find probable cause before a prosecution can commence. Petitioners presented no contrary authority to the case of *State v. Wolfe, Supra* where prosecution by indictment was permitted. Further, Petitioners did not address the clear authority granted in Ohio Revised Code Section 2939.08 that authorizes a Grand Jury to inquire of all offenses committed within the county.

Petitioners correctly cite the case of *Miller v. California,* 413 U.S. 15 (1973) which states that a jury applying contemporary community standards must decide if an item is obscene. Apparently, Petitioners believe a trial jury can make this determination, while a Grand Jury cannot. Petitioners seem to say that only a Judge can make the prior determination that an item is obscene before an arrest warrant is issued. The respondent submits, however, that a Grand Jury of nine citizens is better able to determine contemporary community standards than one Judge. Petitioners' argument is both illogical and unsupported by law. The method employed in this case made it more likely that contemporary community standards would be utilized before a prosecution commenced, and it provided more protection than is constitutionally necessary for the Petitioners.

Although substantive First Amendment issues are alleged in this petition, the narrow issue presented in this appeal is primarily a procedural one. If the petitioners prevail on their argument in this case, the logical extension will require prior adversarial proceedings before a crime can be charged whenever First Amendment issues arise. The United States Congress or the Ohio General Assembly could choose to require those additional procedural safeguards but have not chosen to do so. Until its legislature enacts those procedures, prior judicial intervention is not required in Ohio before a prosecution for pandering obscenity can commence.

CONCLUSION

For the reasons advanced in the foregoing brief of Respondent, it is respectfully submitted that the writ of certiorari should not issue in this case.

Respectfully submitted,

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